incident "crosses state lines than when it occurs entirely within the State." Pet. App. A at 7a. The Minnesota Court noted that discrimination by a state tax may occur in one of three ways: "if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." Pet. App. A at 7a. (citing *Amerada Hess Corp. v. Dir., Div. of Taxation, New Jersey Dep't of Treas.*, 490 U.S. 66, 75 (1989)).

The Minnesota Supreme Court then examined whether the tax discriminated in any of these three ways. It first noted:

> Mayo does not argue that the exemption had a discriminatory intent or purpose. The Commissioner suggests, and Mayo does not disagree, that the purpose of the revenue exemption was to avoid "pyramiding" tax liability, based on an intent to avoid multiple taxation within Minnesota.

Pet. App. A at 7a. It concluded that there was no basis to find that the purpose or intent of the exemption was to discriminate against interstate commerce. *Id.* at 7a-8a.

The Minnesota Court next considered the remaining two forms of discrimination, stating:

> Likewise, Mayo does not explicitly argue that the revenue exemption was discriminatory in effect. Instead, it argues that the MinnesotaCare exemption facially discriminates against interstate commerce "because it denies an exclusion for payments received from non-Minnesota providers that is allowed for payments received from Minnesota providers." The United States Supreme Court has held that a state tax is facially discriminatory, and therefore virtually per se invalid, if it "*expressly* distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate

> market." *Camps Newfound*, 520 U.S. at 575-76, 117 S.Ct. 1590 (emphasis added).

Pet. App. A at 8a. Having concluded that Mayo was asserting facial discrimination, the Minnesota Supreme Court proceeded to analyze Mayo's claim, reviewing its own precedents which had invalidated state taxes under the Commerce Clause, as well as the decisions of this Court.[8]

The Minnesota Court began by observing that the tax exemption was not explicitly based on geography, unlike the state taxes in other cases which had been invalidated as facially discriminatory. It stated: "By contrast, the MinnesotaCare exemption is based on whether the revenue is received from a hospital, surgical center, or a health-care provider on whom 'liability for tax is imposed,' without explicit reference to the location of that provider." Pet. App. A at 9a. The Court then analyzed Mayo's claim that facial discrimination did not require an explicit geographic reference based on this Court's decisions in *Armco Inc. v. Hardesty*, 467 U.S. 638, 642-43 (1984), and *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 240-41 (1987), which Mayo asserted rested on the tax's "potential impact on interstate commerce." Pet. App. A at 9a. But in *Armco* and *Tyler Pipe*, as well as in a hypothetical tax structure considered by this Court in a

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[8] The Minnesota Supreme Court has not been reluctant, in a proper case, to strike down a discriminatory state tax exemption that facially discriminated against interstate commerce. *See, e.g., Chapman v. Comm'r of Revenue*, 651 N.W.2d 825 (Minn. 2002) (holding statute that limited charitable income tax deduction to contributions to Minnesota-based charities facially discriminated against interstate commerce). *See also Hutchinson Technology, Inc. v. Comm'r of Revenue*, 698 N.W.2d 1 (Minn. 2005) (construing corporate franchise tax deduction so as to not discriminate against taxpayer in violation of foreign commerce clause).

footnote in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 192 n.6 (1995), the Minnesota Court observed that there is a crucial distinction, because the successive taxation falls upon the same taxpayer, whereas in this case the successive tax on which the exemption is based is paid by a third party. Pet. App. A at 12a-13a.

After reviewing the two cases it found "most relevant" to consideration of the facial discrimination issue – *Armco* and *Tyler Pipe* (Pet. App. A at 9a), the Minnesota Supreme Court next discussed two of this Court's decisions that Mayo would later contend were repudiated in *Fulton* – *Darnell v. Indiana*, 226 U.S. 390 (1912), and *Kidd v. Alabama*, 188 U.S. 730 (1903). Pet. at 7. The Minnesota Court considered the history of the *Darnell* and *Kidd* decisions, based on this Court's reference to *Darnell* in the *Jefferson Lines* footnote. It concluded that the two cases, coupled with the footnote in *Jefferson Lines*, suggest that the Commerce Clause does not in every case require equal treatment when a state tax exemption is allowed "for payment by a third party of a separate in-state tax but not of a separate out-of-state tax." Pet. App. A at 14a.

Ultimately, the Minnesota Supreme Court held, on the basis of the sparse stipulated record before it and on Mayo's purely hypothetical claims of discrimination, any potential for which was eliminated by the presence of a tax credit, that Mayo failed to satisfy the burden of proving the tax exemption was discriminatory. It stated:

> We conclude that Mayo has not met its burden of proving that the MinnesotaCare tax revenue exemption, Minn. Stat. § 295.53, subd. 1(a)(4)-(5), is either unfairly apportioned or discriminatory under *Complete Auto*, and hold that

> the provision is constitutional under the Commerce Clause of the United States Constitution. We affirm the decision of the tax court.

5. Mayo then filed a Petition for Rehearing before the Minnesota Supreme Court in which it contended that "binding authority" required the Minnesota Court to reverse its holding that the MinnesotaCare tax does not facially discriminate against interstate commerce.[9] Specifically, Mayo argued that a rehearing should be granted because this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), established that the MinnesotaCare tax facially discriminates against interstate commerce. The Commissioner responded that *Fulton* was concerned almost exclusively with the application of the so-called "compensatory tax" doctrine to a concededly facially discriminatory tax. In *Fulton*, the Court characterized the North Carolina intangibles tax, which was levied on a portion of the value of corporate stock in inverse proportion to the portion of the corporation's income subject to another tax, the state's income tax, as plainly discriminatory:

> *There is no doubt that the intangibles tax facially discriminates against interstate commerce.* A regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying

[9] The Rehearing Petition to the Minnesota Supreme Court also addressed Mayo's dispute over the Minnesota Court's application of the internal consistency test and its construction of the tax's credit provision, issues not raised by the Petition to this Court.

> their trades in interstate commerce. *The Secretary practically concedes as much, and relies instead on the compensatory tax defense.* The only issue, then, is whether the taxable percentage deduction can be sustained as compensatory.

516 U.S. at 333 (emphasis added) (footnote omitted).[10] Hence, as the question of facial discrimination was not even in serious dispute in *Fulton*, the Commissioner argued the decision provided no support for Mayo's assertion, raised for the first time in its Petition for Rehearing, that *Fulton* compelled a holding that the MinnesotaCare tax was facially discriminatory. The Minnesota Supreme Court denied Mayo's Petition for Rehearing. Pet. App. C at 52a. In so doing, it addressed Mayo's argument that it had relied on repudiated authority in upholding the tax exemption:

> We recognize that in *Fulton Corp. v. Faulkner*, where the "only issue" was whether a facially discriminatory tax was nevertheless constitutional as a "compensatory" tax, the Supreme Court held that *Darnell* and *Kidd* were "no longer good law under the Commerce Clause." *Fulton*, 516 U.S. at 333-34, 346. But we read this holding as distinguishing *Darnell* and *Kidd* for the constitutional standard that a state must satisfy to justify a facially discriminatory

[10] Because liability for the intangibles tax was calculated in inverse proportion to the percentage of a corporation's business conducted in the state, the tax plainly discriminated against the stock of corporations conducting little or no business in the state. As this Court noted, the stock of a corporation conducting 100 percent of its business in the state would be subject to a 100 percent deduction, while the stock of a corporation conducting none of its business in the state would be subject to no deduction and would be taxable on 100 percent of its value. 516 U.S. at 328.

> tax – "strictest scrutiny" not "rational basis." *Id.* at 345-46. This distinction is not material to our analysis of whether the MinnesotaCare tax is facially discriminatory. Further, we cannot ignore that when the tax liability of a third-party is involved, the Court signaled in *Jefferson Lines* that *Darnell* remains relevant. *See Jefferson Lines*, 514 U.S. 192-93 n.6. Thus, when we view *Jefferson Lines* and *Fulton* together, we conclude that *Darnell* and *Kidd* remain relevant when, as here, a taxpayer's claim that a tax is facially discriminatory is premised on a third party's tax burden.

Id. at 52a-53a.[11]

REASONS FOR DENYING THE PETITION

For several reasons, this case does not present a proper occasion for this Court to undertake consideration of the allegedly sweeping constitutional issue under the dormant Commerce Clause, unresolved after *Jefferson Lines*, that the Petition seeks to raise – namely whether equal treatment is required when a state tax credit or exemption is allowed for payment of instate taxes by a third party but not for payment of out-of-state taxes. First, the decision of the Minnesota Supreme Court does not conflict with any decision of this Court. Rather, the allegedly conflicting cases are fundamentally different from this case, as the Minnesota Supreme Court concluded. Second, the Minnesota Supreme Court's decision is not in conflict with the decisions of other state appellate courts,

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[11] *Fulton* addressed *Darnell* in the context of application of the compensatory tax doctrine, which need be applied only *after* it has been determined that a tax is facially discriminatory. *See Fulton*, 516 U.S. at 348 (Rehnquist, J., concurring).

as the Petition suggests, because the tax regimes considered in those cases are not analogous to the health care services tax regime considered by the Minnesota Court in this case. Finally, the sparse stipulated record in this case contains no evidence of any actual discriminatory impact on anyone, as Mayo's claims in the Minnesota courts rested entirely upon theory and hypothetical examples, given that its primary argument below was that the tax was not internally consistent. This record is not adequately developed for the Court's consideration of the issue Mayo seeks to have reviewed. Nor is the issue likely to arise or to be of importance in several other states, as the Petition claims (Pet. at 24), in the near future.

I. The Minnesota Supreme Court's Holding That The Minnesotacare Tax Exemption Does Not Facially Discriminate Against Interstate Commerce Is Not In Conflict With Prior Decisions Of This Court.

The Minnesota Supreme Court's holding that the MinnesotaCare tax exclusion provided under Minn. Stat. § 295.53, subd. 1(a)(4)-(5) does not facially discriminate against interstate commerce is not in conflict with any prior decision of this Court. Indeed, Mayo agrees that the Minnesota Supreme Court fully considered the relevant precedents of this Court in evaluating the impact of the tax on interstate commerce, as the Petition largely relies on the same cases the Minnesota Court found relevant. *E.g.*, Pet. at 10-14. Rather, the Petition simply disputes the Minnesota Court's view of the meaning of those precedents and whether they should be applied or extended to the present case.

At the outset, it should be noted that if constitutional considerations are temporarily put to the side, there are important policy reasons for a state in the vanguard of developing legislation to address the societal problem of providing health care to its populace, particularly in a time of rising medical costs, to include a provision akin to the exemption in issue as part of the funding mechanism for the legislation. Medical costs were spiraling out of control at the time the MinnesotaCare legislation was proposed.[12] The Minnesota Legislature did not want to exacerbate the cost problem by enacting a pyramiding tax that would be added on by each successive provider in a series of related health care transactions. Yet it had to choose to place the incidence of the tax somewhere. In the case of MinnesotaCare, it was generally placed on the health care provider closest to the ultimate consumer of services – the patient. Other providers were generally exempted from the tax. Had the incidence of tax been placed at the far end of the chain of medical services, on the ultimate provider, Mayo would be taxable on 100 percent of its gross revenues, but it would have not an inkling of a Commerce Clause complaint, as the taxability of its customer would then be irrelevant.

The Petition does not dispute that Minnesota has a right to impose a tax on 100 percent of Mayo's health care services furnished in Minnesota, so long as the state tax does so in a manner that does not discriminate against interstate commerce. For example, Mayo apparently concedes that every time it makes a sale of its services

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[12] One study indicated that nationwide the average health care payments for a typical family increased by over 146 percent from 1980 to 1991 and projected a 439 percent increase by the year 2000. Chadwick, *supra*, 19 Wm. Mitchell L. Rev. at 963.

directly to a patient, whether the patient is within or without Minnesota, Mayo is required to pay the tax.[13]

But beyond compelling practical concerns, the Minnesota Supreme Court's holding that the MinnesotaCare tax exclusion does not facially discriminate against interstate commerce is not in conflict with any prior decision of this Court. This Court has stated that the term "discrimination" in the dormant Commerce Clause context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc., v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). The tax exemption statute in issue does not discriminate in this way.

It is true that the exclusion from gross revenues of Mayo's transactions with many Minnesota hospitals, surgical centers, and health care providers has the effect of requiring it to pay tax primarily on its transactions with out-of-state entities, as those entities constitute the vast majority of its customers and as they are not liable for the tax. Minn. Stat. § 295.53, subd. 1(a)(4)-(5) (2000), Resp. App. A at 10a. But this is not a geographic-based distinction that discriminates against interstate commerce under the Commerce Clause. Rather, it is a distinction based on

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[13] Pet. at 3, n.3. Mayo attempts to evade the fact that the statute does not treat inter-state and intra-state transactions made directly with patients differently, by alleging that such transactions are not covered by the exemption. *Id.* But direct-patient transactions are outside the exemption only because patients, regardless of their location (much like Mayo's out-of-state customers), are not themselves subject to the tax. This merely highlights the fact that the exemption applies only because Mayo's non-patient customers are taxpayers who will themselves be liable for the tax, not because the customers are located in Minnesota.

Minnesota's uncontested authority to impose a tax on health care transactions occurring entirely within its borders, and with which it has a substantial nexus, such as Mayo's rendering in Minnesota of medical reference laboratory services, coupled with a rational desire not to tax more than one of a series of related transactions. Furthermore, under the exemption, both in-state and out-of-state customers of Mayo are subjected to the expense of the MinnesotaCare tax but once, albeit at different links in the chain of distribution of medical services.

As this Court has said: "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities. . . . [T]his assumption has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause. . . ." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997) (footnote omitted). In this case, for purposes of determining whether payments for taxable medical services are excludible from gross revenues under the MinnesotaCare tax, the Minnesota Legislature has distinguished between two kinds of payments: those on which tax has directly been imposed and those which have not yet been taxed. A payment on which tax has already been imposed on a health care provider is not substantially similar to a payment which has never been taxed, regardless of the location of the taxpayer's customer.

Indeed, the MinnesotaCare tax statute in effect for the tax years in issue is replete with exemptions which plainly have nothing to do with the location of the customer of the Minnesota health care provider. For example, under Minn. Stat. § 295.53, subd. 1 (Resp. App. A at 9a), payments received from providers who have received payments from

Medicare (section 295.53, subd. 1(1), (5) (Resp. App. A at 9a-10a)), the chemical dependency fund (section 295.53, subd. 1(5), (10) (Resp. App. A at 10a)), any government agency (section 295.53, subd. 1(5), (13) (Resp. App. A at 10a-11a)), or under the Federal Employee Health Benefits Act (section 295.53, subd.1(5), (20) (Resp. App. A at 9a, 12a)), are exempt regardless of whether the payer is a Minnesota or a non-Minnesota provider. On the other hand, under Minn. Stat. § 295.53, subd. 1(14) (Resp. App. A at 11a), receipts received by a provider who furnishes services to Minnesota community residential mental health facilities and Minnesota community mental health centers are not exempt (only services provided directly by these entities are exempt), despite the fact that they may be located in Minnesota. In addition, under Minn. Stat. § 295.50, subd. 4(b)(1) (Resp. App. A at 2a-3a), the definition of a health care provider excludes specific entities. However, services provided to these entities are still subject to tax. Thus, services to supervised living facilities for persons with mental retardation, adult foster homes, boarding care homes, and home health agencies (as defined in Minn. Stat. § 295.50, subd. 4(b)(1) (Resp. App. A at 2a-3a)) are taxable, since they are not excluded from the definition of patient services under section 295.50, subd. 9b (Resp. App. A at 4a).[14] The forgoing examples confirm that the MinnesotaCare tax is sometimes imposed on

[14] A service is subject to tax only if it meets two requirements: (1) it is provided by a "health care provider"; and (2) it qualifies as "patient services." Minn. Stat. §§ 295.50, subd. 3 (defining "gross revenues" as amounts received for patient services) (Resp. App. A at 1a), 295.52, subd. 2 (imposing tax on health care provider's gross revenues) (Resp. App. A at 7a). As the law was changed in 2003, after the tax years in issue, to exclude services to these entities from the definition of "patient services," services to these entities are no longer subject to tax.

services provided to a Minnesota entity, while the tax is sometimes not imposed when services are provided to a non-Minnesota entity.

Mayo contends, however, that the Minnesota Supreme Court's decision conflicts with this Court's precedents prohibiting state tax schemes from discriminating against out-of-state commerce by offering an exemption for payment of an in-state tax but not an out-of-state tax. Yet it has failed to identify any such precedent that considered a tax analogous to the MinnesotaCare tax in issue in this case. Mayo first argues that this case is similar to *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). Pet. at 10. But in *Armco*, the disputed tax exemption from West Virginia's gross receipts applied to a single taxpayer, imposing a tax on wholesalers of tangible personal property, but providing an exemption for those wholesalers who also engaged in in-state manufacturing and paid the state's manufacturing tax. The tax plainly discriminated against out-of-state wholesalers, as there was no exemption offered to wholesalers who manufactured and paid a manufacturing tax in another state. Hence, the out-of-state wholesaler/manufacturer could be subject to two taxes, while a wholesaler/manufacturer that wholesaled and manufactured in a single state would only pay one tax. 467 U.S. at 644 ("If Ohio . . . imposes a like tax on its manufacturers – which they have every right to do – then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax.").

There is no analogous discriminatory exemption in this case. It is undisputed that Mayo performs all of its medical reference laboratory services in Minnesota. It can only be taxed on those services in Minnesota, because, as

the Minnesota Supreme Court observed, they all occur in Minnesota. Pet. App. A at 22a ("the activities of Mayo that we consider here all occur within a single jurisdiction"). The MinnesotaCare tax statute does not purport to tax medical services performed in another state.[15] Hence, Mayo would never be subject in another state to a tax equivalent to the MinnesotaCare tax on its sale of medical services to a customer in that state, even assuming the other state had sufficient nexus to impose tax. Nor is there anything in the record to suggest that Mayo pays tax on any of its services sold to customers in other states. Furthermore, a medical reference laboratory performing services in another state and selling to a customer in Minnesota would not be subject to the MinnesotaCare tax, as Minnesota does not tax medical services performed elsewhere. Hence, *Armco* is not a conflicting precedent.

Mayo also argues that this case is similar to *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987), where the State of Washington imposed a manufacturing tax that provided a partial exemption applicable to the portion of the manufacturer's output that was taxed under Washington's wholesale tax. As in *Armco*, the out-of-state manufacturer was disadvantaged by being potentially subject to both a manufacturer's tax in its home state and a wholesale tax in Washington. 483 U.S. at 240 ("This statutory exemption for manufacturers that sell their products within the State has the same facially

[15] Minn. Stat. § 295.53, subd. 1 (9) provides an express exemption for payments received by a health care provider, such as Mayo, "for care provided outside Minnesota." App. A at 10a. Minn. Stat. § 295.51, subd. 1 further limits the tax to the extent the taxpayer's contacts or presence in Minnesota permit taxation of gross revenues for patient services under the United States Constitution. App. A at 6a.

discriminatory consequences as the West Virginia exemption we invalidated in Armco.") Hence, like *Armco*, *Tyler Pipe* turned on the potential that the out-of-state seller would be subject to multiple tax burdens from which the in-state seller was exempt. This is simply not the case under the MinnesotaCare tax where no medical service provider can be taxed more than once.

Furthermore, even the possibility that the value of a medical lab service furnished in Minnesota may be taxed in a different transaction, such as the provision of hospital care or the furnishing of medical advice and care in another state, is not forbidden by this Court's dormant Commerce Clause precedents. As the Court said in *Jefferson Lines*, "[W]e were not, of course, oblivious to the possibility of successive taxation of related events up and down the stream of commerce, and our cases are implicit with the understanding that the Commerce Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along." 514 U.S. at 187-88.

But even this possibility is not present here, based on the Minnesota Supreme Court's holding with respect to the availability of the MinnesotaCare tax credit.[16] Indeed, the presence of a credit would appear to satisfy any

[16] The Petition recognizes that the MinnesotaCare tax "does not draw an explicit geographic distinction," and, therefore, argues that the "practical effect of the tax's exemption provision is to require Mayo to pay the tax only when doing business with out-of-state customers." Pet. at 16 n.9. But if it is necessary to consider the "practical effect" of the statute to ascertain the facial discrimination alleged by Mayo, then it is unquestionably necessary to consider the "practical effect" of the entire statute, including the credit for taxes paid to another jurisdiction, in determining whether it has a discriminatory effect on interstate commerce.

possible concern expressed in the hypothetical example in the *Jefferson Lines* footnote that "equality of treatment of interstate and intrastate activity has been the common theme among the paired (or "compensating") tax schemes that have passed constitutional muster." *Jefferson Lines*, 514 U.S. at 192 n.6. Under the credit provision, as construed by the Minnesota Court, by way of example, a Wisconsin hospital customer purchasing medical laboratory services from Mayo and subject to a similar Wisconsin tax would be entitled to a credit from Minnesota for the tax paid by Mayo (or it could claim a credit against its Wisconsin tax for the tax paid by Mayo, since Wisconsin's law is presumed to be similar to Minnesota's). Pet. App. A. at 24a-25a, 30a. Thus, to the extent equality may be constitutionality required, the credit provision provides equality of treatment for taxes paid by Mayo's customers, whether in Minnesota or in another state imposing a similar tax on the gross receipts of medical providers.[17]

One legal commentator, whose earlier work with respect to state taxation and the Commerce Clause is relied on in the Petition (Pet. at 12 n.8), has recently observed that the credit provision in the MinnesotaCare tax does indeed eliminate even the possibility of a hypothetical burden on interstate commerce:

> [T]he [Minnesota] court found that any internal consistency objection was eliminated by the credit that Minnesota provided for any "hospital, surgical center, pharmacy, or health care

[17] Inexplicably, Mayo posits, without citing any authority or providing any rationale, that the "Minnesota Supreme Court's interpretation of the tax credit provision has no bearing on the facial discrimination question." Pet. at 7 n.7.

> provider that has paid taxes" to another jurisdiction. The court construed the credit provision broadly so that the operative words – "health care provider that has paid taxes" – included "those who paid the tax indirectly through a pass-through charge."
>
> > The existence of the credit, as thus construed, eliminates any hypothetical burden on interstate commerce. A Minnesota hospital would not be encouraged to purchase all laboratory services in Minnesota because it would be entitled to credit any economic incidence of a tax imposed by another state on services bought from a provider in that state against the MinnesotaCare tax otherwise imposed on the revenue it received from the resale of those services to a patient in Minnesota. Likewise, a[n out-of-state] hospital would not be discouraged from purchasing its laboratory services in interstate commerce for the same reason.
>
> *We believe the court is on solid ground in rejecting the internal consistency argument on the basis of the availability of a credit.* Although one may question the defensibility of the court's construction of the statute (an issue we do not address), *the availability of the credit does eliminate the internal consistency problem for the reasons advanced by the court.*

Jerome R. Hellerstein & Walter Hellerstein, I *State Taxation*, ¶ 4.15(1)(b)(vii) & text following n.607.13 (3d ed. July, 2005 update), *available at* http://checkpoint.riag.com, state & local tax library, WG&L state tax treatise (emphasis added) (footnotes omitted).

It is likewise critical to note that the tax exclusion at issue in this case is far different from the exemption

considered by the Court in *Camps Newfound/Owatonna, Inc. v. Town Of Harrison*, 520 U.S. 564 (1997). Unlike that exemption, the MinnesotaCare tax exclusion does not create a "tax subsidy" for local medical laboratories, such as Mayo. Instead, it provides an exclusion for those taxpayers subject to the MinnesotaCare tax whose customers have already paid or will pay the tax. This provision serves the legitimate legislative purpose of avoiding pyramiding of the tax by limiting it to only one taxable event per series of related transactions.[18] It can hardly be said to create an economic tax subsidy or competitive advantage for in-state labs. From the perspective of the ultimate consumer of medical services, the patient, but one incidence of the MinnesotaCare tax will be applied to the bill for medical services. Furthermore, from the patient's perspective, it is irrelevant whether the incidence of the tax is placed on the lab, the hospital, or the physician, so long as multiple taxation is avoided.

II. The Minnesota Supreme Court's Holding Is Not In Conflict With The Decisions Of The Highest Or Intermediate Appellate Courts Of Other States.

The Petition also contends that the Court should take this case to resolve "confusion among state courts by providing a definitive answer to the question left unresolved by *Jefferson Lines*." Pet. at 20-21. However, the four appellate decisions cited in the Petition, which it alleges

[18] In essence, the exemption serves to shift the point at which tax is collected in the chain of distribution of medical services furnished in Minnesota, 100 percent of which services are fairly apportioned to Minnesota, as they are furnished entirely in Minnesota.

are in irreconcilable conflict with the Minnesota Supreme Court's decision in this case, are readily distinguishable, as they are variations on the *Fulton* decision, where there was no serious dispute that the tax statute facially discriminated against interstate commerce. In addition, none of these cases consider the taxation of services sold across state lines.[19]

The first allegedly conflicting state appellate case discussed in the Petition, *D.D.I., Inc. v. State*, 657 N.W.2d 228 (N.D. 2003), is plainly not an authority for Mayo's facial discrimination claim. In that case, as in *Fulton*, the Court noted that "the Commissioner concedes the dividends received deduction facially discriminates against interstate commerce." 657 N.W.2d at 231. Aside from the obvious factual and legal distinctions in this income tax case, *D.D.I.*, like *Fulton*, is concerned not with facial discrimination but with the compensatory tax doctrine. It is not a conflicting state precedent.

The second allegedly conflicting state appellate case discussed in the Petition, *Farmer Bros. Co. v. Franchise Tax Bd.* 134 Cal. Rptr. 2d 390 (2003), *cert. denied*, 124 S.Ct. 1411 (2004), is similarly distinguishable, because it is an income tax case similar to *Fulton*, where the tax was held to be both facially discriminatory and to violate internal consistency. 134 Cal.Rptr.2d at 398, 400. The only significant distinction from *D.D.I.* and *Fulton* is that the presence of facial discrimination was not conceded. *Id.* at 398-400.

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[19] It is noteworthy that none of these allegedly conflicting foreign cases was called to the attention of the Minnesota Supreme Court or the Minnesota Tax Court, either as persuasive authority or otherwise.

The next allegedly conflicting state appellate case discussed in the Petition is *Annenberg v. Commonwealth*, 757 A.2d 333 (Pa. 1998). This case, similar to *Farmer Bros.*, is distinguishable because it is governed by *Fulton* and involves the relationship between three dissimilar taxing schemes, rather than an anti-pyramiding provision within a single tax. In *Annenberg* a personal property tax was held to be facially discriminatory because it exempted from tax the stock of foreign corporations that did business in or had a taxable nexus in Pennsylvania, and were thereby subject to one of two other state taxes. The stock of all other foreign corporations was taxed. 757 A.2d at 337-38. There is plainly no analogy between the purpose or effect of this personal property tax and the MinnesotaCare tax on medical services, under which an exemption is allowed so that imposition of the MinnesotaCare tax in related transactions is limited to a single service provider.

The remaining state appellate case discussed in the Petition, *St. Ledger v. Commonwealth*, 912 S.W.2d 34 (Ky. 1995), is also not analogous to this case. In *St. Ledger* the Supreme Court of Kentucky held facially discriminatory a stock ownership tax that exempted the shares of stockholders in corporations that paid a tax on at least 75 percent of their property to Kentucky. 912 S.W.2d at 41. However, the court initially upheld the tax, relying on *Darnell*. *Id.* at 43. The decision was then vacated and remanded by this Court for further consideration in light of *Fulton*. *St. Ledger v. Kentucky Revenue Cabinet*, 517 U.S. 1206 (1996). On remand, the parties conceded the tax was invalid in light of *Fulton*, because it could not "pass the strictest scrutiny" required of facially discriminatory restrictions under this Court's modern Commerce Clause decisions. *St. Ledger v. Commonwealth*, 942 S.W.2d 893, 896 (Ky. 1997). Contrary to Mayo's claim, this case serves

to reinforce the Minnesota Supreme Court's view in this matter that *Fulton* only distinguished *Darnell* and *Kidd* "for the constitutional standard that a state must satisfy to justify a facially discriminatory tax – 'strictest scrutiny' not 'rational basis.'" Pet. App. A at 14a n.6. As the Kentucky Court had determined previously that the stock ownership tax was facially discriminatory, and as the parties conceded *Fulton* was controlling, the *St. Ledger* cases are simply not in conflict with the Minnesota Supreme Court's determination in this case.

None of the allegedly conflicting state appellate cases cited in the Petition is remotely close on its facts or law to the present case. Mayo's claim that this Court should take this case to resolve conflict and confusion among state appellate courts where none exists is without merit.

III. This Is Not A Proper Case For Consideration Of The Issue Raised By The Petition Based On The Record Presented And The Lack Of Evidence Of Even Potential Discrimination Against Interstate Commerce.

In addition to the fact that the Minnesota Supreme Court's decision does not conflict with prior decisions of this Court or of state appellate courts, there are practical reasons why the Court should not review this case.

The Petition seeks review of what it describes as "the recurring and significant question left unresolved in *Jefferson Lines*" (Pet. at 9) – namely whether a state tax must provide for equal treatment when a credit or exemption is allowed to a taxpayer for payment by a third party of in-state taxes but not out-of-state taxes. More particularly, the question is whether an exemption or credit is justified under the dormant Commerce Clause where a

state has sufficient authority to tax a series of related in-state service transactions and, to avoid pyramiding of the tax and/or for ease of administration, chooses to collect the tax once, at a particular point in the chain of distribution of these services. The record in this case does not present a good basis for the Court's consideration of this question.

The record below is limited to a short stipulation of facts (Resp. App. B) and attached exhibits (which relate to the computation of Mayo's state tax liability). There is no factual development of economic or other evidence to demonstrate the Petition's sweeping claim that the decision below "is an impediment to the dormant Commerce Clause's 'fundamental purpose'" of assuring free trade among the states.[20] Pet. at 25. Indeed, in light of the credit allowed by the MinnesotaCare tax for similar taxes paid in other states, there is ultimately no economic impact on interstate transactions as a result of the limited tax exemption granted to Mayo for sales to customers who are liable for the MinnesotaCare tax. Nor is there any indication that other state or federal courts have issued conflicting decisions in the area of taxation of services sold across state lines. Hence, there is no compelling reason for the Court to delve into this area at this juncture, given the sparse record and the relatively undeveloped state of the law.

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[20] For example, there is nothing in the record to support the Petition's contention that the tax has a discriminatory effect. Pet. at 20. Mayo's implied premise is that its labs are operating at full capacity and that the tax exemption will thus encourage it to devote disproportionate resources to Minnesota customers to avoid payment of the tax. But given the fact that Mayo's out-of-state customers ultimately pay no more tax than its Minnesota customers, due to the availability of a credit, there is little economic sense to Mayo's contention.

In addition, the MinnesotaCare tax on medical services is a very recent, innovative type of service tax, designed to fund a significant public welfare purpose – providing medical care for the uninsured in a time of upward spiraling costs. To effectuate this purpose, the tax contains an anti-pyramiding exemption which effectively prevents tax from being assessed multiple times by Minnesota on related medical services furnished to a single patient. The Court should allow further development in the law prior to considering whether the Petition's speculative, hypothetical claims of adverse effects on interstate commerce have any merit and justify treatment of such tax provisions as facially discriminatory.

Finally, this case presents the unusual claim of an in-state taxpayer complaining that in allowing an exemption for some of its revenues, all of which could properly be subject to tax, a state tax has discriminated in violation of the dormant Commerce Clause. Whether or not Mayo can provide economic justification for its discrimination claim, it has other readily available forums in which to seek redress – through the political process. If an in-state taxpayer and employer, such as Mayo, can demonstrate actual adverse impact on its business due to the Legislature's "allowance" of an in-state tax exemption, there is ample opportunity to resolve its complaint through the political process without resort to this Court.

For the foregoing reasons, it is clear the Petitioner's claim that the MinnesotaCare tax facially discriminates against interstate commerce is either speculative or

demonstrably wrong and that it does not, in any case, warrant this Court's review.[21]

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[21] Nor is there any reason for the Court to hold this case, pending resolution of two pending, but completely unrelated, investment tax credit cases which happen to involve the dormant Commerce Clause.

295.50. Definitions

Subdivision 1. Definitions. For purposes of sections 295.50 to 295.59, the following terms have the meanings given.

Subd. 2. Commissioner. "Commissioner" is the commissioner of revenue.

Subd. 2a. Delivered outside of Minnesota. "Delivered outside of Minnesota" means property which the seller delivers to a common carrier for delivery outside Minnesota, places in the United States mail or parcel post directed to the purchaser outside Minnesota, or delivers to the purchaser outside Minnesota by means of the seller's own delivery vehicles, and which is not later returned to a point within Minnesota, except in the course of interstate commerce.

Subd. 3. Gross revenues. "Gross revenues" are total amounts received in money or otherwise by:

(1) a hospital for patient services;

(2) a surgical center for patient services;

(3) a health care provider, other than a staff model health carrier, for patient services;

(4) a wholesale drug distributor for sale or distribution of legend drugs that are delivered in Minnesota by the wholesale drug distributor, by common carrier, or by mail, unless the legend drugs are delivered to another wholesale drug distributor who sells legend drugs exclusively at wholesale. Legend drugs do not include nutritional products as defined in Minnesota Rules, part 9505.0325; and

(5) a staff model health plan company as gross premiums for enrollees, copayments, deductibles, coinsurance, and fees for patient services covered under its contracts with groups and enrollees.

Subd. 4. Health care provider. (a) "Health care provider" means:

(1) a person whose health care occupation is regulated or required to be regulated by the state of Minnesota furnishing any or all of the following goods or services directly to a patient or consumer: medical, surgical, optical, visual, dental, hearing, nursing services, drugs, laboratory, diagnostic or therapeutic services;

(2) a person who provides goods and services not listed in clause (1) that qualify for reimbursement under the medical assistance program provided under chapter 256B;

(3) a staff model health plan company;

(4) an ambulance service required to be licensed; or

(5) a person who sells or repairs hearing aids and related equipment or prescription eyewear.

(b) Health care provider does not include:

(1) hospitals; medical supplies distributors, except as specified under paragraph (a), clause (5); nursing homes licensed under chapter 144A or licensed in any other jurisdiction; pharmacies; surgical centers; bus and taxicab transportation, or any other providers of transportation services other than ambulance services required to be licensed; supervised living facilities for persons with mental retardation or related conditions, licensed under Minnesota Rules, parts 4665.0100 to 4665.9900; residential care homes

licensed under chapter 144B; board and lodging establishments providing only custodial services that are licensed under chapter 157 and registered under section 157.17 to provide supportive services or health supervision services; adult foster homes as defined in Minnesota Rules, part 9555.5105; day training and habilitation services for adults with mental retardation and related conditions as defined in section 252.41, subdivision 3; and boarding care homes, as defined in Minnesota Rules, part 4655.0100;

(2) home health agencies as defined in Minnesota Rules, part 9505.0175, subpart 15; a person providing personal care services and supervision of personal care services as defined in Minnesota Rules, part 9505.0335; a person providing private duty nursing services as defined in Minnesota Rules, part 9505.0360; and home care providers required to be licensed under chapter 144A;

(3) a person who employs health care providers solely for the purpose of providing patient services to its employees; and

(4) an educational institution that employs health care providers solely for the purpose of providing patient services to its students if the institution does not receive fee for service payments or payments for extended coverage.

Subd. 5. Repealed 1993, c. 345, art. 13, § 24.

Subd. 6. Home health care services. "Home health care services" are services:

(1) defined under the state medical assistance program as home health agency services provided by a home health agency, personal care services and supervision of personal care services, private duty nursing

services, and waivered services or services by home care providers required to be licensed under chapter 144A; and

(2) provided at a recipient's residence, if the recipient does not live in a hospital, nursing facility, as defined in section 62A.46, subdivision 3, or intermediate care facility for persons with mental retardation as defined in section 256B.055, subdivision 12, paragraph (d).

Subd. 6a. Hospice care services. "Hospice care services" are services:

(1) as defined in Minnesota Rules, part 9505.0297; and

(2) provided at a recipient's residence, if the recipient does not live in a hospital, nursing facility as defined in section 62A.46, subdivision 3, or intermediate care facility for persons with mental retardation as defined in section 256B.055, subdivision 12, paragraph (d).

Subd. 7. Hospital. "Hospital" means a hospital licensed under chapter 144, or a hospital licensed by any other jurisdiction.

Subds. 8 to 9a. Repealed, 1996, c. 471, art. 6, § 13.

Subd. 9b. Patient services. "Patient services" means inpatient and outpatient services and other goods and services provided by hospitals, surgical centers, or health care providers. They include the following health care goods and services provided to a patient or consumer:

(1) bed and board;

(2) nursing services and other related services;

(3) use of hospitals, surgical centers, or health care provider facilities;

(4) medical social services;

(5) drugs, biologicals, supplies, appliances, and equipment;

(6) other diagnostic or therapeutic items or services;

(7) medical or surgical services;

(8) items and services furnished to ambulatory patients not requiring emergency care;

(9) emergency services; and

(10) covered services listed in section 256B.0625 and in Minnesota Rules, parts 9505.0170 to 9505.0475.

(b) "Patient services" does not include:

(1) services provided to nursing homes licensed under chapter 144A; and

(2) examinations for purposes of utilization reviews, insurance claims or eligibility, litigation, and employment, including reviews of medical records for those purposes.

Subd. 9c. Person. "Person" means an individual, partnership, limited liability company, corporation, association, governmental unit or agency, or public or private organization of any kind.

Subd. 10. Repealed, c. 345, art. 13, § 24.

Subd. 10a. Pharmacy. "Pharmacy" means a pharmacy required to be licensed under chapter 151, or a pharmacy required to be licensed by any other jurisdiction.

Subd. 10b. Regional treatment center. "Regional treatment center" means a regional center as defined in section 253B.02, subdivision 18, and named in sections 252.025, subdivision 1; 253.015, subdivision 1; 253.201; and 254.05.

Subds. 11 to 12a. Repealed, c. 471, art. 6, § 13.

Subd. 12b. Staff model health plan company. "Staff model health plan company" means a health plan company as defined in section 62Q.01, subdivision 4, which employs one or more types of health care provider to deliver health care services to the health plan company's enrollees.

Subd. 13. Surgical center. "Surgical center" is an outpatient surgical center as defined in Minnesota Rules, chapter 4675, or a similar facility located in any other jurisdiction.

Subd. 14. Wholesale drug distributor. "Wholesale drug distributor" means a wholesale drug distributor required to be licensed under sections 151.42 to 151.51.

Subd. 15. Legend drug. "Legend drug" means a legend drug as defined in section 151.01, subdivision 17.

295.51. Minimum contacts required for jurisdiction to tax gross revenue

Subdivision 1. Business transactions in Minnesota. A hospital, surgical center, or health care provider is subject to tax under sections 295.50 to 295.59 if it is "transacting business in Minnesota." A hospital, surgical center, or health care provider is transacting business in Minnesota if it maintains contacts with or presence in the state of Minnesota sufficient to permit taxation of gross revenues

received for patient services under the United States Constitution.

Subd. 1a. Nexus in Minnesota. A wholesale drug distributor has nexus in Minnesota if its contacts with or presence in Minnesota is sufficient to satisfy the requirements of the United States Constitution.

Subd. 2. Repealed 1993, c. 345, art. 13, § 24.

295.52. Taxes imposed

Subdivision 1. Hospital tax. A tax is imposed on each hospital equal to two percent of its gross revenues.

Subd. 1a. Surgical center tax. A tax is imposed on each surgical center equal to two percent of its gross revenues.

Subd. 1b. Repealed by Laws 1997, c. 225, art. 3, § 23, par. (a); Laws 1997, c. 251, § 28.

Subd. 2. Provider tax. A tax is imposed on each health care provider equal to two percent of its gross revenues.

Subd. 3. Wholesale drug distributor tax. A tax is imposed on each wholesale drug distributor equal to two percent of its gross revenues.

Subd. 4. Use tax; prescription drugs.

(a) A person that receives prescription drugs for resale or use in Minnesota, other than from a wholesale drug distributor that paid the tax under subdivision 3, is subject to a tax equal to the price paid to the wholesale drug distributor multiplied by the tax percentage specified

in this section. Liability for the tax is incurred when prescription drugs are received or delivered in Minnesota by the person.

(b) A person that receives prescription drugs for use in Minnesota from a nonresident pharmacy required to be registered under section 151.19 is subject to a tax equal to the price paid by the nonresident pharmacy to the wholesale drug distributor or the price received by the nonresident pharmacy, whichever is lower, multiplied by the tax percentage specified in this section. Liability for the tax is incurred when prescription drugs are received in Minnesota by the person.

Subd. 4a. Tax collection. A wholesale drug distributor with nexus in Minnesota, who is not subject to tax under subdivision 3, on all or a particular transaction or a nonresident pharmacy with nexus in Minnesota, is required to collect the tax imposed under subdivision 4, from the purchaser of the drugs and give the purchaser a receipt for the tax paid. The tax collected shall be remitted to the commissioner in the manner prescribed by section 295.55, subdivision 3.

Subd. 5. Volunteer ambulance services. Volunteer ambulance services are not subject to the tax under this section. For purposes of this requirement, "volunteer ambulance service" means an ambulance service in which all of the individuals whose primary responsibility is direct patient care meet the definition of volunteer under section 144E.001, subdivision 15. The ambulance service may employ administrative and support staff, and remain eligible for this exemption, if the primary responsibility of these staff is not direct patient care.

Subd. 6. Hearing aids and prescription eyewear. The tax liability of a person who meets the definition of a health care provider solely because the person sells or repairs hearing aids and related equipment or prescription eyewear is limited to the gross revenues received from the sale or repair of these items.

Subd. 7. Tax reduction. Notwithstanding subdivisions 1, 1a, 2, 3, and 4, the tax imposed under this section equals for calendar years 1998, 1999, 2000, and 2001, 1.5 percent of the gross revenues received on or after January 1, 1998, and before January 1, 2002.

295.53. Exemptions; special rules

Subdivision 1. Exemptions. (a) The following payments are excluded from the gross revenues subject to the hospital, surgical center, or health care provider taxes under sections 295.50 to 295.57:

(1) payments received for services provided under the Medicare program, including payments received from the government, and organizations governed by sections 1833 and 1876 of title XVIII of the federal Social Security Act, United States Code, title 42, section 1395, and enrollee deductibles, coinsurance, and copayments, whether paid by the Medicare enrollee or by a Medicare supplemental coverage as defined in section 62A.011, subdivision 3, clause (10). Payments for services not covered by Medicare are taxable;

(2) medical assistance payments including payments received directly from the government or from a prepaid plan;

(3) payments received for home health care services;

(4) payments received from hospitals or surgical centers for goods and services on which liability for tax is imposed under section 295.52 or the source of funds for the payment is exempt under clause (1), (2), (7), (8), (10), (13) or (20);

(5) payments received from health care providers for goods and services on which liability for tax is imposed under this chapter or the source of funds for the payment is exempt under clause (1), (2), (7), (8), (10), (13) or (20);

(6) amounts paid for legend drugs, other than nutritional products, to a wholesale drug distributor who is subject to tax under section 295.52, subdivision 3, reduced by reimbursements received for legend drugs under clauses (1), (2), (7), and (8);

(7) payments received under the general assistance medical care program including payments received directly from the government or from a prepaid plan;

(8) payments received for providing services under the MinnesotaCare program including payments received directly from the government or from a prepaid plan and enrollee deductibles, coinsurance, and copayments. For purposes of this clause, coinsurance means the portion of payment that the enrollee is required to pay for the covered service;

(9) payments received by a health care provider or the wholly owned subsidiary of a health care provider for care provided outside Minnesota;

(10) payments received from the chemical dependency fund under chapter 254B;

(11) payments received in the nature of charitable donations that are not designated for providing patient services to a specific individual or group;

(12) payments received for providing patient services incurred through a formal program of health care research conducted in conformity with federal regulations governing research on human subjects. Payments received from patients or from other persons paying on behalf of the patients are subject to tax;

(13) payments received from any governmental agency for services benefiting the public, not including payments made by the government in its capacity as an employer or insurer;

(14) payments received for services provided by community residential mental health facilities licensed under Minnesota Rules, parts 9520.0500 to 9520.0690, community support programs and family community support programs approved under Minnesota Rules, parts 9535.1700 to 9535.1760, and community mental health centers as defined in section 245.62, subdivision 2;

(15) government payments received by a regional treatment center;

(16) payments received for hospice care services;

(17) payments received by a health care provider for hearing aids and related equipment or prescription eyewear delivered outside of Minnesota;

(18) payments received by an educational institution from student tuition, student activity fees, health care service fees, government appropriations, donations, or

grants. Fee for service payments and payments for extended coverage are taxable;

(19) payments received for services provided by: assisted living programs and congregate housing programs;

(20) payments received under the federal Employees Health Benefits Act, United States Code, title 5, section 8909(f), as amended by the Omnibus Reconciliation Act of 1990.

(b) Payments received by wholesale drug distributors for legend drugs sold directly to veterinarians or veterinary bulk purchasing organizations are excluded from the gross revenues subject to the wholesale drug distributor tax under sections 295.50 to 295.59.

Subd. 2. Deductions for staff model health plan company. In addition to the exemptions allowed under subdivision 1, a staff model health plan company may deduct from its gross revenues for the year:

(1) amounts paid to hospitals, surgical centers, and health care providers that are not employees of the staff model health plan company for services on which liability for the tax is imposed under section 295.52;

(2) net amounts added to reserves, to the extent that the amounts added do not cause total reserves to exceed 200 percent of the statutory net worth requirement, the calculation of which may be determined on a consolidated basis, taking into account the amounts held in reserve by affiliated staff model health plan companies;

(3) assessments for the comprehensive health insurance plan under section 62E.11; and

(4) amounts spent for administration as reported as total administration to the department of health in the statement of revenues, expenses, and net worth pursuant to section 62D.08, subdivision 3, clause (a).

Subd. 3. Separate statement of tax. A hospital, surgical center, or health care provider must not state the tax obligation under section 295.52 in a deceptive or misleading manner. It must not separately state tax obligations on bills provided to patients, consumers, or other payers when the amount received for the services or goods is not subject to tax.

Pharmacies that separately state the tax obligations on bills provided to consumers or to other payers who purchase legend drugs may state the tax obligation as the wholesale price of the legend drugs multiplied by the tax percentage specified in section 295.52. Pharmacies must not state the tax obligation based on the retail price.

Whenever the commissioner determines that a person has engaged in any act or practice constituting a violation of this subdivision, the commissioner may bring an action in the name of the state in the district court of the appropriate county to enjoin the act or practice and to enforce compliance with this subdivision, or the commissioner may refer the matter to the attorney general or the county attorney of the appropriate county. Upon a proper showing, a permanent or temporary injunction, restraining order, or other appropriate relief must be granted.

Subd. 4. Expired.

Subd. 4a. Credit for research. (a) In addition to the exemptions allowed under subdivision 1, a hospital or health care provider may claim an annual credit against

the total amount of tax, if any, the hospital or health care provider owes for that calendar year under sections 295.50 to 295.57. The credit shall equal 2.5 percent of revenues for patient services used to fund expenditures for qualifying research conducted by an allowable research program. The amount of the credit shall not exceed the tax liability of the hospital or health care provider under sections 295.50 to 295.57.

(b) For purposes of this subdivision, the following requirements apply:

(1) expenditures must be for program costs of qualifying research conducted by an allowable research program;

(2) an allowable research program must be a formal program of medical and health care research conducted by an entity which is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or is owned and operated under authority of a governmental unit;

(3) qualifying research must:

(A) be approved in writing by the governing body of the hospital or health care provider which is taking the deduction under this subdivision;

(B) have as its purpose the development of new knowledge in basic or applied science relating to the diagnosis and treatment of conditions affecting the human body;

(C) be subject to review by individuals with expertise in the subject matter of the proposed study but who have no financial interest in the proposed study and are not involved in the conduct of the proposed study; and

(D) be subject to review and supervision by an institutional review board operating in conformity with federal regulations if the research involves human subjects or an institutional animal care and use committee operating in conformity with federal regulations if the research involves animal subjects. Research expenses are not exempt if the study is a routine evaluation of health care methods or products used in a particular setting conducted for the purpose of making a management decision. Costs of clinical research activities paid directly for the benefit of an individual patient are excluded from this exemption. Basic research in fields including biochemistry, molecular biology, and physiology are also included if such programs are subject to a peer review process.

(c) No credit shall be allowed under this subdivision for any revenue received by the hospital or health care provider in the form of a grant, gift, or otherwise, whether from a government or nongovernment source, on which the tax liability under section 295.52 is not imposed.

(d) The taxpayer shall apply for the credit under this section on the annual return under section 295.55, subdivision 5.

(e) Beginning September 1, 2001, if the actual or estimated amount paid under this section for the calendar year exceeds $2,500,000, the commissioner of finance shall determine the rate of the research credit for the following calendar year to the nearest one-half percent so that refunds paid under this section will most closely equal $2,500,000. The commissioner of finance shall publish in the State Register by October 1 of each year the rate of the credit for the following calendar year. A determination

under this section is not subject to the rulemaking provisions of chapter 14.

Subd. 5. Repealed, Laws 1997, c. 225, art. 3, § 23.

295.54. Credit for taxes paid

Subdivision 1. Taxes paid to another state. A hospital, surgical center, or health care provider that has paid taxes to another jurisdiction measured by gross revenues and is subject to tax under sections 295.52 to 295.59 on the same gross revenues is entitled to a credit for the tax legally due and paid to another jurisdiction to the extent of the lesser of (1) the tax actually paid to the other jurisdiction, or (2) the amount of tax imposed by Minnesota on the gross revenues subject to tax in the other taxing jurisdictions.

Subd. 2. Pharmacy refund. A pharmacy may claim an annual refund against the total amount of tax, if any, the pharmacy owes during that calendar year under section 295.52, subdivision 2. The refund shall equal the amount paid by the pharmacy to a wholesale drug distributor subject to tax under section 295.52, subdivision 3, for legend drugs delivered by the pharmacy outside of Minnesota, multiplied by the tax percentage specified in section 295.52. If the amount of the refund exceeds the tax liability of the pharmacy under section 295.52, subdivision 1b, the commissioner shall provide the pharmacy with a refund equal to the excess amount. Each qualifying pharmacy must apply for the refund on the annual return as provided under section 295.55, subdivision 5. The refund must be claimed within one year of the due date of the return. Interest on refunds paid under this subdivision will begin to accrue 60 days after the date a claim for

refund is filed. For purposes of this subdivision, the date a claim is filed is the due date of the return or the date of the actual claim for refund, whichever is later.

Subd. 3. Wholesale drug distributor credit. A wholesale drug distributor who has paid taxes to another state or province or territory of Canada measured by gross revenues or sales and is subject to tax under sections 295.52 to 295.59 on the same gross revenues or sales is entitled to a credit for the tax legally due and paid to another state or province or territory of Canada to the extent of the lesser of (1) the tax actually paid to the other state or province or territory of Canada or (2) the amount of tax imposed by Minnesota on the gross revenues or sales subject to tax in the other taxing jurisdictions.

295.55. Payment of tax

Subdivision 1. Scope. The provisions of this section apply to the taxes imposed under sections 295.50 to 295.58.

Subd. 2. Estimated tax; hospitals; surgical centers. (a) Each hospital or surgical center must make estimated payments of the taxes for the calendar year in monthly installments to the commissioner within 15 days after the end of the month.

(b) Estimated tax payments are not required of hospitals or surgical centers if:

(1) the tax for the current calendar year is less than $500; or (2) the tax for the previous calendar year is less than $500, if the taxpayer had a tax liability and was doing business the entire year; or (3) if a hospital has been allowed a grant under section 144.1484, subdivision 2, for the year.

(c) Underpayment of estimated installments bear interest at the rate specified in section 270.75, from the due date of the payment until paid or until the due date of the annual return whichever comes first. An underpayment of an estimated installment is the difference between the amount paid and the lesser of (1) 90 percent of one-twelfth of the tax for the calendar year or (2) one-twelfth of the total tax for the previous calendar year if the taxpayer had a tax liability and was doing business the entire year.

Subd. 3. Estimated tax; other taxpayers. (a) Each taxpayer, other than a hospital or surgical center, must make estimated payments of the taxes for the calendar year in quarterly installments to the commissioner by April 15, July 15, October 15, and January 15 of the following calendar year.

(b) Estimated tax payments are not required if: (1) the tax for the current calendar year is less than $500; or (2) the tax for the previous calendar year is less than $500, if the taxpayer had a tax liability and was doing business the entire year.

(c) Underpayment of estimated installments bear interest at the rate specified in section 270.75, from the due date of the payment until paid or until the due date of the annual return whichever comes first. An underpayment of an estimated installment is the difference between the amount paid and the lesser of (1) 90 percent of one-quarter of the tax for the calendar year or (2) one-quarter of the total tax for the previous calendar year if the taxpayer had a tax liability and was doing business the entire year.

Subd. 4. Electronic funds transfer payments. A taxpayer with an aggregate tax liability of $120,000 or more during a fiscal year ending June 30, must remit all liabilities

by means of a funds transfer as defined in section 336.4A-104, paragraph (a), in the subsequent calendar year.

The funds transfer payment date, as defined in section 336.4A-401, is on or before the date the tax is due. If the date the tax is due is not a funds-transfer business day, as defined in section 336.4A-105, paragraph (a), clause (4), the payment date is on or before the first funds-transfer business day after the date the tax is due.

Subd. 5. Annual return. The taxpayer must file an annual return reconciling the estimated payments by March 15 of the following calendar year.

Subd. 6. Form of returns. The estimated payments and annual return must contain the information and be in the form prescribed by the commissioner.

Subd. 7. Extensions for filing returns. If good cause exists, the commissioner may extend the time for filing MinnesotaCare tax returns for not more than 60 days.

295.56. Transfer of accounts receivable

When a hospital or health care provider transfers, assigns, or sells accounts receivable to another person who is subject to tax under this chapter, liability for the tax on the accounts receivable is imposed on the transferee, assignee, or buyer of the accounts receivable. No liability for these accounts receivable is imposed on the transferor, assignor, or seller of the accounts receivable.

295.57. Collection and enforcement; refunds; rulemaking; application of other chapters; access to records; interest on overpayments

Subdivision 1. Application of other chapters. Unless specifically provided otherwise by sections 295.50 to 295.59, the enforcement, interest, and penalty provisions under chapter 294, appeal provisions in sections 289A.43 and 289A.65, criminal penalties in section 289A.63, and refunds provisions in section 289A.50, and collection and rulemaking provisions under chapter 270, apply to a liability for the taxes imposed under sections 295.50 to 295.59.

Subd. 2. Access to records. For purposes of administering the taxes imposed by sections 295.50 to 295.59, the commissioner may access patients' records that contain billing or other financial information without prior consent from the patients. The data collected is classified as private or nonpublic data.

Subd. 3. Interest on overpayments. Interest must be paid on an overpayment refunded or credited to the taxpayer from the date of payment of the tax until the date the refund is paid or credited. For purposes of this subdivision, the date of payment is the due date of the return or the date of actual payment of the tax, whichever is later.

Subd. 4. Sampling techniques. The commissioner may use statistical or other sampling techniques consistent with generally accepted auditing standards in examining returns or records and making assessments.

295.58. Deposit of revenues and payment of refunds

The commissioner shall deposit all revenues, including penalties and interest, derived from the taxes imposed by sections 295.50 to 295.57 and from the insurance premiums tax imposed by section 297I.05, subdivision 5, on health maintenance organizations, community integrated service networks, and nonprofit health service plan corporations in the health care access fund. There is annually appropriated from the health care access fund to the commissioner of revenue the amount necessary to make refunds under this chapter.

295.581. Prohibition on non-MinnesotaCare transfers from fund

Notwithstanding any law to the contrary, and notwithstanding section 645.33, money in the health care access fund shall be appropriated only for purposes that are consistent with past and current MinnesotaCare appropriations in Laws 1992, chapter 549; Laws 1993, chapter 345; Laws 1994, chapter 625; and Laws 1995, chapter 234, or for initiatives that are part of the section 1115 of the Social Security Act health care reform waiver submitted to the federal health care financing administration by the commissioner of human services as appropriated in Laws 1995, chapter 234.

295.582. Authority

(a) A hospital, surgical center, or health care provider that is subject to a tax under section 295.52, or a pharmacy that has paid additional expense transferred

under this section by a wholesale drug distributor, may transfer additional expense generated by section 295.52 obligations on to all third-party contracts for the purchase of health care services on behalf of a patient or consumer. The additional expense transferred to the third-party purchaser must not exceed the tax percentage specified in section 295.52 multiplied against the gross revenues received under the third-party contract, and the tax percentage specified in section 295.52 multiplied against copayments and deductibles paid by the individual patient or consumer. The expense must not be generated on revenues derived from payments that are excluded from the tax under section 295.53. All third-party purchasers of health care services including, but not limited to, third-party purchasers regulated under chapter 60A, 62A, 62C, 62D, 62H, 62N, 64B, 65A, 65B, 79, or 79A, or under section 471.61 or 471.617, must pay the transferred expense in addition to any payments due under existing contracts with the hospital, surgical center, pharmacy, or health care provider, to the extent allowed under federal law. A third-party purchaser of health care services includes, but is not limited to, a health carrier or community integrated service network that pays for health care services on behalf of patients or that reimburses, indemnifies, compensates, or otherwise insures patients for health care services. A third-party purchaser shall comply with this section regardless of whether the third-party purchaser is a for-profit, not-for-profit, or nonprofit entity. A wholesale drug distributor may transfer additional expense generated by section 295.52 obligations to entities that purchase from the wholesaler, and the entities must pay the additional expense. Nothing in this section limits the ability of a hospital, surgical center, pharmacy, wholesale drug distributor, or health care provider to recover all

or part of the section 295.52 obligation by other methods, including increasing fees or charges.

(b) Each third-party purchaser regulated under any chapter cited in paragraph (a) shall include with its annual renewal for certification of authority or licensure documentation indicating compliance with paragraph (a).

(c) Any hospital, surgical center, or health care provider subject to a tax under section 295.52 or a pharmacy that has paid additional expense transferred under this section by a wholesale drug distributor may file a complaint with the commissioner responsible for regulating the third-party purchaser if at any time the third-party purchaser fails to comply with paragraph (a).

(d) If the commissioner responsible for regulating the third-party purchaser finds at any time that the third-party purchaser has not complied with paragraph (a), the commissioner may take enforcement action against a third-party purchaser which is subject to the commissioner's regulatory jurisdiction and which does not allow a hospital, surgical center, pharmacy, or provider to pass-through the tax. The commissioner may by order fine or censure the third-party purchaser or revoke or suspend the certificate of authority or license of the third-party purchaser to do business in this state if the commissioner finds that the third-party purchaser has not complied with this section. The third-party purchaser may appeal the commissioner's order through a contested case hearing in accordance with chapter 14.

295.59. Severability

If any section, subdivision, clause, or phrase of sections 295.50 to 295.582 is for any reason held to be unconstitutional or in violation of federal law, the decision shall not affect the validity of the remaining portions of sections 295.50 to 295.582. The legislature declares that it would have passed sections 295.50 to 295.582 and each section, subdivision, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subdivisions, sentences, clauses, or phrases is declared unconstitutional.

APPENDIX B

STATE OF MINNESOTA

TAX COURT

DOCKET NO. 7605

Mayo Collaborative Services, Inc., Appellant, vs. Commissioner of Revenue, Appellee.	In the Matter of the Appeal from the Commissioner's Order dated June 12, 2003, relating to the MinnesotaCare Tax of Mayo Collaborative Services, Inc., for the Tax Years 1998 through 2001

STIPULATION

The following Stipulation is entered into by and between the parties by the undersigned, their counsel of record. It is stipulated that the following statements may be accepted as facts and that all exhibits referred to herein and attached hereto are incorporated in this Stipulation and made a part hereof; provided, however, that either party may object to the admission of any such statements or exhibits into evidence on the ground of materiality or relevance. This Stipulation is made for the purposes of this case only and is not binding on the parties for any other purpose or in any other action or proceeding.

1. Mayo Collaborative Services, Inc. ("Appellant") is a business corporation organized and existing under the laws of the State of Minnesota. Appellant's place of business is located in Rochester, Minnesota. Appellant is engaged in the business of providing medical reference laboratory services to hospitals, surgical centers, health care providers, and individual patients. A medical reference

laboratory performs laboratory tests on samples submitted by its customers and reports to the customers on the test results. Appellant does not perform the laboratory services itself but purchases them from third parties, principally from Mayo Clinic Rochester, a nonprofit corporation affiliated with Appellant, that operates a laboratory in Rochester, Minnesota. As a result of engaging in this business, Appellant is a "health care provider," within the meaning of Minn. Stat. § 295.50, subd. 4, and is subject to the MinnesotaCare tax imposed upon a "health care provider" by §§ 295.50-295.59 ("Statute").

2. Appellant timely filed annual MinnesotaCare tax returns with Appellee for the calendar years 1998 through 2001 ("Tax Periods") and paid Appellee the amounts of tax shown thereon to be due. Copies of the tax return worksheets for the four Tax Periods are attached hereto as Exhibits 1 through 4, respectively. Appellant also filed an amended MinnesotaCare tax return for the calendar year 1998 and paid Appellee the amount of tax shown thereon to be due (with applicable interest). A copy of the 1998 amended tax return worksheet is attached hereto as Exhibit 5. During the Tax Periods, the MinnesotaCare tax was imposed, pursuant to Minn. Stat. § 295.52, subd. 7, at the rate of 1.5% of gross revenues.

3. In preparing its tax returns (and the amended 1998 return) for the Tax Periods, Appellant included (at Line 1) the gross revenues received from all sources for its medical reference laboratory services and excluded from those gross revenues (at Line 7) the amounts received for its medical reference laboratory services from customers that are hospitals, surgical centers or health care providers. The exclusions reflected amounts received from such

customers located both within and without Minnesota. The amounts so excluded were:

Year	Amount
1998	$ 105,124,730
1999	122,628,785
2000	131,529,186
2001	144,667,847

4. In his Order dated June 12, 2003 ("Order"), from which this appeal is taken, Appellee disallowed that portion of the exclusion described in Paragraph 3 that Appellee determined to represent "non-Minnesota receipts" paid from sources other than Medicare, medical assistance and government agency reimbursement. The amounts thus disallowed were:

Year	Amount
1998	$ 62,167,065
1999	72,518,347
2000	77,153,863
2001	84,860,886

Copies of the Order and of Appellee's related transmittal letter dated June 12, 2003 are attached hereto as Exhibit 6.

5. The Order assesses additional tax liabilities against Appellant, equal to 1.5% of the disallowed exclusions, in the following amounts:

Year	Amount
1998	$ 932,506
1999	1,087,775

2000	1,157,308
2001	1,272,913
Total	$ 4,450,502

In addition, the Order assesses interest on the tax assessments (through June 12, 2003) in the following amounts:

Year	Amount
1998	$ 304,099
1999	267,522
2000	189,894
2001	99,462
Total	$ 860,977

6. A "preliminary audit report" showing the adjustments proposed by Appellee was prepared by Appellee and sent to Appellant on September 6, 2002. Copies of the preliminary audit report and of Appellee's related transmittal letter, dated September 6, 2002, are attached hereto as Exhibit 7.

7. The adjustments for "non-Minnesota receipts" made in Exhibits 6 and 7 reflect a computation made by Appellee for the sample month of December 2001. A copy of this computation is attached hereto as Exhibit 8.

8. Under the Statute as interpreted by Appellee, (a) the receipts of a medical reference laboratory located in Minnesota (such as Appellant) are excludible from taxable gross revenues if they are received from hospitals, surgical centers or health care providers that provide services on which liability for the MinnesotaCare tax is imposed and (b) liability for the tax is imposed upon hospitals, surgical centers and health care providers (subject to statutory

exemptions) if they provide services in Minnesota. Under the Statute as interpreted by Appellee, the receipts of hospitals, surgical centers and health care providers are taxable gross revenues if the receipts are for services provided in Minnesota, including any part of the receipts that reflects services purchased by the hospitals, surgical centers and health care providers from medical reference laboratories located either inside or outside Minnesota.

9. During the tax periods in issue, revenues derived from the MinnesotaCare tax were used to fund the MinnesotaCare program (Minn. Stat. Ch. 256L), other health care initiatives referenced in Minn. Stat. § 295.581, and other state programs covered by legislative appropriations from the Health Care Access Fund, and the only purpose of the tax was to raise revenues for those uses.

10. The State of Minnesota does not apply the MinnesotaCare tax to services provided by hospitals, surgical centers or health care providers if the services are furnished at a location outside Minnesota.

11. If the statutory interpretation reflected in the Order is approved by the Court but is held to cause the Statute to violate the Commerce Clause of the U.S. Constitution (art. I, § 8, cl. 3), the parties shall request the Court to set a hearing to consider and determine (a) the manner in which the Statute should be severed pursuant to Minn. Stat. §§ 295.59 and 645.20 to cure the violation and (b) any meaningful backward-looking relief from the violation to which Appellant may be entitled pursuant to the Due Process Clause of the Fourteenth Amendment.

Dated: April 5, 2004

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Supreme Court, U.S.
FILED
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No. 05-684

IN THE

Supreme Court of the United States

MAYO COLLABORATIVE SERVICES, INC.,
Petitioner,

v.

COMMISSIONER OF REVENUE,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The MinnesotaCare tax is a textbook example of facially discriminatory taxation that violates the dormant Commerce Clause. The tax is levied on the gross receipts of Minnesota health-care providers, but includes an exemption for revenue that Minnesota providers receive from customers who are *themselves* liable for the tax. Minn. Stat. § 295.53 subd. 1(a)(3)-(4). Because (as the State itself concedes (Opp. 3)), the MinnesotaCare tax is not assessed on out-of-state health-care providers and does not include a parallel tax exemption for revenue received from customers who pay another State's gross-receipts tax, the MinnesotaCare tax and its exemption ensure that Mayo will be liable for the tax *whenever* it sells its medical-testing services to an *out-of-state* customer but will be *exempt* from the tax when selling to an *in-state* customer. It is *impossible* to reconcile this indisputably discriminatory tax scheme with this Court's dormant Commerce Clause jurisprudence, in which this Court, time and again, has required States to accord evenhanded tax treatment to interstate and intrastate transactions. Indeed, this Court declared in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), that it has "*never* upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes but failed to extend such credit to payment of equivalent out-of-state taxes." *Id.* at 192 n.6 (emphasis added). That is *precisely* the type of tax the State has imposed on Mayo here.

Confronted with the daunting task of defending a decision that conflicts with this Court's precedents and the decisions of three other state supreme courts, respondent Commissioner of Revenue (the "State") advances three spurious arguments in an effort to demonstrate that review by this Court is either unnecessary or unwise. Not one of these contentions constitutes a valid basis to deny or defer review in this significant case.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DORMANT COMMERCE CLAUSE PRECEDENTS.

1. The State first contends that "the decision of the Minnesota Supreme Court does not conflict with any decision of this Court." Opp. 13. That assertion is simply indefensible. The Supreme Court of Minnesota expressly and repeatedly based its holding on the antiquated decisions in *Kidd v. Alabama*, 188 U.S. 730 (1903), and *Darnell v. Indiana*, 226 U.S. 390 (1912)—two cases that this Court has expressly held are "no longer good law under the Commerce Clause." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 346 (1996); *see also* Pet. App. 13a; *id.* 52a (on rehearing). A state supreme court cannot base its interpretation of the United States Constitution on two cases that this Court has *expressly repudiated* without creating a "conflict" with this Court's precedents. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *Kidd* and *Darnell* are "no longer good law under the Commerce Clause." *Fulton*, 516 U.S. at 346. The Minnesota Supreme Court's decision to the contrary squarely conflicts with this Court's decision in *Fulton*.

Indeed, as the Minnesota Supreme Court itself conceded, absent its (misguided) reliance on *Kidd* and *Darnell*, the controlling decisions of this Court are *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), and *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), which (as the Minnesota Supreme Court also recognized) stand for the proposition "that a tax exemption *is* facially discriminatory if applied to in-state sales but denied to out-of-state sales." Pet. App. 12 (emphasis added). Indeed, *Tyler Pipe* announced a blanket rule that a State may *not* discriminate against interstate commerce by "tax[ing] a transaction . . . more heavily when it crosses state lines than when it occurs entirely within the State." 483 U.S. at 240-41 (internal quotation marks omitted); *see also Armco Inc.*, 467 U.S. at 640 (same). Once the pillars of the Minnesota Supreme Court's reasoning (*Kidd* and *Darnell*) are set aside (as they

must be under *Fulton*), the State's glib assertion that the decision below accords with this Court's precedents (and with *Tyler Pipe* and *Armco*, in particular) completely collapses.

The State attempts to minimize *Fulton*'s scope by suggesting that the facial discrimination issue in that case was not "serious[ly] dispute[d]" and that when the Court categorically declared *Kidd* and *Darnell* to be "no longer good law under the Commerce Clause" the Court actually meant to *preserve* the viability of those precedents in future "facial discrimination" Commerce Clause cases (even though the Court did not offer even a hint of this purported material qualification to its analysis). Opp. 12. That is not a supportable (indeed, it is a preposterous) reading of *Fulton*.

In *Fulton*, this Court invalidated on facial discrimination grounds a North Carolina stock-ownership tax that included a deduction based upon the percentage of the issuing corporation's income that was subject to North Carolina taxation. 516 U.S. at 328. Under the deduction, the amount of tax paid by stockholders decreased as the issuing company's in-state business increased. *Id.* Contrary to respondent's suggestion, the State in *Fulton* did *not* concede that the exemption was facially discriminatory. *See* Brief of Respondent at 9, *Fulton Corp.*, 1995 WL 440367. This Court therefore directly addressed the facial discrimination question and *held* that the tax *was* facially discriminatory because it "favor[ed] domestic corporations over their foreign competitors" and "discourage[d] domestic corporations from plying their trades in interstate commerce" (*Fulton Corp.*, 516 U.S. at 333)—which is what the tax and exemption at issue here do as well.

The State's suggestion that *Fulton* cannot be read as a facial discrimination case is therefore belied by the unambiguous language of *Fulton* itself.[1] Because *Fulton* rejected

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[1] Indeed, the State cannot even bring itself to state its novel interpretation of *Fulton* in unequivocal terms. *See* Opp. 11 ("*Fulton* was concerned *almost* exclusively with the application of the so-called 'compensatory tax doctrine.'") (emphasis added); *see also id.* at 12, 25. The word "al-

Kidd and *Darnell* for *all* Commerce Clause purposes, the Minnesota Supreme Court's unabashed reliance upon those two decisions to sustain the MinnesotaCare tax is flatly, unambiguously, and hopelessly inconsistent with this Court's precedents.[2]

Indeed, the State's suggestion that the *Fulton* Court rejected *Kidd* and *Darnell* only in the "compensatory tax" context undercuts the State's position that review is unnecessary. "Compensatory tax" analysis becomes relevant only once a tax has been deemed facially discriminatory. *See Tyler Pipe Indus., Inc.*, 483 U.S. at 242-43. Even under the State's view, then, the Minnesota Supreme Court erred in relying on *Kidd* and *Darnell*, because with regard to the question of facial discrimination, those cases (under the State's view) must mean that taxes that provide an exemption for a third party's in-state tax payments but not its payment of comparable out-of-state taxes are facially discriminatory under the Commerce Clause. Otherwise, *Kidd* and *Darnell* would not have had to reach the "compensatory tax" question.[3]

But no such tortured reading of those decisions is necessary: *Kidd* and *Darnell* are "no longer good law under the Commerce Clause" (*Fulton*, 516 U.S. at 346) *at all*, and the Minnesota Supreme Court's decision to the contrary flatly conflicts with this Court's precedents.

[Footnote continued from previous page]

most," of course, is necessary because *Fulton did* expressly undertake a facial discrimination inquiry under the Commerce Clause.

[2] The petition (Pet. 14) also demonstrates that the Minnesota Supreme Court's decision is flatly inconsistent with *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), a case that the State tellingly does not even mention, much less purport to reconcile with the decision below.

[3] A tax that facially discriminates against interstate commerce is not unconstitutional if it "'compensates' for the burdens imposed on intrastate commerce by imposing a similar burden on interstate commerce." *Fulton*, 516 U.S. at 331 n.2. Respondent's opposition does not contend that the MinnesotaCare tax is a valid compensatory tax.

2. Respondent also suggests that the MinnesotaCare tax's facial discrimination against interstate commerce is defensible under this Court's precedents because the exemption serves the salutary purpose of preventing the "pyramiding" of multiple taxes on the same transaction. Opp. 5, 15, 24. But there is no "antipyramiding exception" to the dormant Commerce Clause's nondiscrimination requirement. However well-intentioned any State may believe its taxation scheme or exemption structure to be, it cannot adopt a tax that facially discriminates against out-of-state transactions—as Minnesota has done here. A State that wants to prevent the imposition of multiple taxes on a single transaction by providing an exemption where the tax has already been paid must provide a parallel exemption for the payment of a comparable out-of-state tax—a proviso that this Court has repeated more than once. *See Tyler Pipe Indus., Inc.*, 483 U.S. at 246 (rejecting the State of Washington's identical concern, and explaining that the State nonetheless must "provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to *any* State, not just Washington") (emphasis added); *Jefferson Lines, Inc.*, 514 U.S. at 192 n.6 (this Court has "never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes *but failed to extend such credit to payment of equivalent out-of-state taxes*") (emphasis added). Minnesota has not done that here.[4]

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[4] The State also seeks to portray the MinnesotaCare tax as nondiscriminatory by pointing to other exemptions (some of which are no longer effective) in the statute that do not distinguish between in-state and out-of-state revenue. Opp. 17-18. These other exemptions are irrelevant to this case, and have not been challenged by Mayo. A facially discriminatory state tax exemption is not saved from invalidity simply because there exist other exemptions in the code that might themselves be constitutionally valid. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 576 (1997) (invalidating a Maine property tax exemption on dormant Commerce Clause grounds because it discriminated between charities that served in-state and out-of-state customers, even